Office - Supreme Court, U.S.
FILED
AUG 23 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-132

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, CROSS-PETITIONER

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL PARTIES IN OPPOSITION TO THE CROSS-PETITION

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TABLE OF AUTHORITIES

Page

Cases:

California v. *Arizona*, 440 U.S. 59 3

Cummings v. *United States*, 648 F. 2d 289 2

McClellan v. *Kimball*, 623 F. 2d 83 2

Constitution and statutes:

United States Constitution, Tenth Amendment 3

Quiet Title Act:

28 U.S.C. 2409a 2
28 U.S.C. 2409a(f) 2

5 U.S.C. 702 ..... 2, 3

28 U.S.C. 1331 1

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In its cross-petition for certiorari, the State argues that the federal courts have jurisdiction over this case based on a variety of statutes and the United States Constitution. These arguments have no support in the decisions of the courts of appeals or this Court; the cross-petition should accordingly be denied.

1. The State argues that the district court had jurisdiction to enter a declaratory judgment on the navigability of the Little Missouri River in 1889 because that issue is a federal question within 28 U.S.C. 1331, and, having decided

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[1]The facts of this case are set out in the petition filed by the government in *John R. Block, Secretary of Agriculture, et al.* v. *The State of North Dakota, ex rel. Board of University and School Lands*, No. 81-2337 (filed June 22, 1982).

in favor of navigability and therefore State ownership, then to enjoin the federal defendants, whose immunity, if any, is waived by 5 U.S.C. 702 (Cross-Pet. 9-10). The State additionally invokes the doctrine that unauthorized or unconstitutional actions of federal officers are not shielded by sovereign immunity (Cross-Pet. 15-16, 18-20). Accordingly, according to the State, its suit does not rest on the Quiet Title Act (28 U.S.C. 2409a) and the limitations provision of that statute (28 U.S.C. 2409a(f)) is inapplicable.

The argument is ingenious, but wholly circular. The only actions challenged are the federal leasing of land in the bed of the river and assertions of the government's ownership of that land. Those actions are contrary to law only if the United States does not own the underlying land. Plainly, then, the suit turns on the title of the United States and can be brought only under the Quiet Title Act.[2] The courts of appeals which have considered such an attempt to avoid the statute of limitations in the Quiet Title Act have rejected it. See, *e.g.*, *Cummings* v. *United States*, 648 F. 2d 289 (5th Cir. 1981); *McClellan* v. *Kimball*, 623 F. 2d 83 (9th Cir. 1980).[3]

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[2]The State asserts that the United States has conceded the navigability issue in this case (Cross-Pet. at 8-9, 19). This is incorrect. While we have not raised that issue with this Court, we continue in our view that the river was not navigable in 1889 (and is not navigable now).

[3]In *Cummings*, an individual brought an action in state court against a colonel in the Corps of Engineers, among others. The action sought to enjoin the colonel or his agents from going on land on which the United States claimed an easement to deposit dredge spoil. The action was removed to federal district court. On appeal, the Fifth Circuit held that the action could be brought only under the Quiet Title Act because the defendant's actions were improper only if the United States was without title.

Similarly, *McClellan* affirms the dismissal of an ejectment action against a Forest Service Supervisor because, however pleaded, the action only tested the title of the United States.

Nor does 5 U.S.C. 702 waive sovereign immunity in the present context. As stated in the government's petition in No. 81-2337 (at 11 n.8), that provision expressly states that it does not confer " 'authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.' " Because the present action is properly a quiet title action, it is governed by the statute of limitations of that Act; if the statute of limitations in that Act bars the action, then 5 U.S.C. 702 provides no relief.

It will not do, as the State attempts, to start from the proposition that the Little Missouri River was navigable in 1889 and that the State therefore owns the land underlying that river. That is putting the cart before the horse. It has been the government's consistent position in this case that the Little Missouri River was not navigable at the time the State entered the Union. It continues to take that position now. The question here is whether the district court had jurisdiction to decide that issue because of an appropriate waiver of the sovereign immunity of the United States. In the absence of such jurisdiction, the case should have been dismissed.

2. On pages 17-18 of its cross-petition, the State argues that the United States Constitution entitles it to have a federal forum to decide its claim that the Little Missouri River was navigable in 1889. Nothing in the equal footing doctrine or the Tenth Amendment, however, confers such jurisdiction on the federal courts, and the State points to no relevant authority. Indeed, in *California* v. *Arizona*, 440 U.S. 59, 61 (1979), in the context of a quiet title action brought by a state, this Court held it to be "settled that the United States must give its consent to be sued * * *." In the absence of that consent, the action would be required to be dismissed (*id.* at 62-63). The Court found that consent only in the Quiet Title Act (*id.* at 63-65). There is no distinction

to be made: that case, like this one, concerned lands claimed to lie beneath the State's navigable waters at the time of its admission to the Union (*id.* at 60-61). It follows that the State's assertion of a constitutional right to a federal forum has no merit.

For the foregoing reasons, the cross-petition should be denied.

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AUGUST 1982

DOJ-1982-08